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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1166

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THE CHURCH OF SCIENTOLOGY OF CALIFORNIA,  
on its own behalf and on behalf of its members,

DAVID W. JAMES,  
KENNETH WHITMAN,

*Appellants,*

v.

W. MICHAEL BLUMENTHAL,  
Secretary of the Treasury, et al.,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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**APPELLANTS' REPLY MEMORANDUM**

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**APPELLANTS' REPLY MEMORANDUM**

1. The government does not deny that customs inspectors opened not only the air freight cartons but also the sealed envelopes contained inside, and that they proceeded to read private correspondence and documents without possessing even a scintilla of evidence that importation of the documents would violate United States customs or other law. It attempts to obfuscate the substantial constitutional and statutory issues raised by its conduct, however, by suggesting that the search in this case was an ordinary border search of "cartons" for contraband. Thus, for example, the government quotes language from *United States v. Thirty-Seven Photographs*, 402 U.S. 363, uphold-

ing the right of customs officers to "inspect luggage" to exclude "illegal articles" from the country (Gov. Motion at 6).<sup>1</sup>

The present case does not involve the inspection of luggage or cartons, *per se*. While it undoubtedly was unlawful for the customs agents even to open the cartons without reasonable suspicion of a customs violation, see 19 U.S.C. § 482, the critical issue in the case is that the agents also opened the envelopes and read the letters and other documents. No case in the history of the United States has upheld such conduct in the absence of reasonable cause or suspicion to believe that importation would be unlawful.

The government's reliance on *United States v. Ramsey*, 431 U.S. 606, is astonishing. While *Ramsey* upheld the opening of envelopes at the border, it did so upon two caveats: (1) There was reasonable cause to suspect that the envelopes contained contraband; and (2) The search did not involve the reading of correspondence, which was not contained in the envelopes and the reading of which without a warrant in any event would have been barred by regulation. The government's flip assertion here that "those regulations do not pertain to cartons" (Gov. Motion at 7) hardly disposes of the *Ramsey* Court's obvious concern that the reading of correspondence without cause or a warrant would present critical questions under the First and Fourth Amendments. See 431 U.S. at 614, n.8, 623-24. In the instant case, appellants have not argued that a warrant was necessary before the *cartons* could be opened. The mere fact that the Church's air cargo crossed the border, however, could not justify the seizure and wholesale reading of First Amendment materials. The signifi-

<sup>1</sup> References to "Gov. Motion" are to pages in the government's Motion to Affirm. References to "J.S." are to the Jurisdictional Statement.

cance of the instant case lies in the fact that the *writings* contained within the Church's packages were searched and seized, not only absent a warrant, but also without even reasonable cause to suspect that they were materials whose importation was prohibited.

The government cannot argue to the contrary that the correspondence was detained for further examination only after Inspector Hoyle "formed a genuine suspicion that importation might violate § 1305(a)" (Gov. Motion at 7). By that time, the unreasonable initial search of the appellants' correspondence already had occurred. It is significant that Inspector Hoyle never claimed that his reading and detention of the private correspondence was based upon a suspected violation of § 1305(a), or any other statute or regulation (J.S. at 6, 17).<sup>2</sup>

The government makes one final argument in attempting to justify the opening of the cartons by inexplicably stating that 19 U.S.C. § 1582 authorizes the Secretary of the Treasury to "prescribe regulations for the search of persons and baggage . . . coming into the United States from foreign countries . . . ." (Gov. Motion at 8, n.9). The section quoted by the government is merely an enabling statute. The statute does not authorize a regulation allowing the warrantless reading of correspondence or other written documents, with or without cause or suspicion. The government fails to cite a particular regulation relevant to the instant case. The appellants are aware of no such regula-

<sup>2</sup> The government claims that the appellants "concede that customs officials conducted the search for violations at [sic] 19 U.S.C. 1305" (Gov. Motion at 7, n. 7). The appellants have made no such concession with respect to Inspector Hoyle's initial reading of the documents. The government perhaps is referring to the testimony of Customs Agent Peel, quoted by the appellants, that *he* conducted the subsequent more comprehensive search of the appellants' correspondence in an effort to detect violations of § 1305 and "for other violations of the law" (J.S. at 7).

tion. Even if one were promulgated, it would not be constitutional, unless consistent with First and Fourth Amendment requirements.

2. The government has made no response to appellants' argument that the exhaustive search of their correspondence for evidence of "any crime" over a four day period by customs agents working with several Assistant United States Attorneys was a general law enforcement search rather than a border search (J.S. at 18-20). Instead the government attempts to merge the initial search by Inspector Hoyle with the subsequent more comprehensive seizure and search (Gov. Motion at 6-7). The second search simply cannot be analyzed under border search principles (J.S. at 18-20).

3. The government argues that appellants were not aggrieved by the district court's decision applying a limiting construction to 19 U.S.C. § 1305 because that construction applied the First Amendment principles urged by appellants (Gov. Motion at 8-10). The simple answer is that the appellants were aggrieved by the search and seizure of their correspondence and documents, which the government itself seeks to justify as having been authorized under section 1305. Appellants have shown that the statute is unconstitutional on its face, that it is not susceptible of a limiting construction, and that the seizure and search of appellants' correspondence therefore was without legal basis (J.S. at 20-23). Moreover, the customs agents who carried out the search and seizure of the documents did not apply the limiting construction to the statute adopted by the district court after the fact. Rather, Agent Hoyle understood § 1305's prohibition to embrace mere advocacy and acted accordingly. He testified below that it was his duty to forbid importation of "anything . . . indicating over-

throw of the government or actual sabotage", and that "if it were a treasonist [*sic*] type of book advocating overthrow of the government, then it would be a violation of law and not subject to entry" (Transcript, 44-45). Thus the district court's limiting construction came too late to protect appellants' constitutional rights.

On the merits of the issue, the government argues that *United States v. Thirty-Seven Photographs*, 402 U.S. 363, and 19 U.S.C. § 1652 support the district court's limiting construction because they provide a "direction to the courts not to invalidate section 1305(a) if some narrow saving construction can be drawn" (Gov. Motion at 9). But nothing in either *Thirty-Seven Photographs* or section 1652<sup>3</sup> authorizes the Court to construe section 1305 contrary to the intent of Congress. In *Thirty-Seven Photographs*, this Court did no more than read into section 1305(a) the time limits for obscenity determinations mandated by *Freedman v. Maryland*, 380 U.S. 51. In doing so, the Court carefully examined the relevant legislative history of section 1305(a), and concluded that its interpolation of the *Freedman* requirements was "fully consistent with [the statute's] legislative position." *Id.* at 370. The Court, citing *Blount v. Rizzi*, 400 U.S. 410, and *Freedman v. Maryland*, *supra*, also stressed that it will *not* strain to save the constitutionality of a statute by reading into it a purpose at odds with its legislative intent. 402 U.S. at 369.

The present case is governed by *Blount* rather than *Thirty-Seven Photographs*. See also *United States v. Reese*, 92 U.S. 216, 221; *Aptheker v. Secretary of State*,

<sup>3</sup> Section 1652 provides:

If any provision of this chapter, or the application thereof to any person or circumstances is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby.

378 U.S. 500, 515; *Marchetti v. United States*, 390 U.S. 38, 58-60. In enacting section 1305's advocacy provision, Congress intended to proscribe mere abstract advocacy; therefore, the district court erred in incorporating the *Brandenburg* standard into the statute (J.S. at 21-23). Specifically, the 1930 Congress which enacted section 1305 modelled it upon the Espionage Act of 1917's postal prohibition of abstract advocacy, the broad application of which had been upheld in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, and *Masses v. Patten*, 246 F.2d (2d Cir. 1917). Congress fully intended section 1305 to reach the same written advocacy materials prohibited by the Postmaster General under the Espionage Act. See H.R. Rep. No. 7, 71st Cong. 1st Sess., at 160 (1930); 82 Congressional Record 5487-5520 (Senate debates, 1930).

In response, the government suggests that because section 1305 did not share the postal prohibition's "foundation" in the Espionage Act of 1917, and was "not principally designed to guard against treason or to preserve morale in time of war," it was not intended to have the same sweeping reach as the postal prohibition (Gov. Motion at 9-10, n. 10). The government similarly distinguishes the *Burleson* and *Masses* cases as "war-time" cases, arguing that their application of the postal prohibition to prohibit the mailing of "abstract advocacy" written materials did not necessarily inform Congress' intent in enacting section 1305. Thus, the government concludes that section 1305's "purposes and history do not unequivocally forbid the district court's construction" (*Id.*).

*Burleson* and *Masses* were, indeed, "war-time" cases, but their failure to distinguish between abstract advocacy and incitement or to require a likelihood of imminent danger did not rest on peculiarly war-time considerations. See Z.

Chafee, *Free Speech in the United States*, 48-50, 299, 304 (1941). The postal law, today codified as 18 U.S.C. § 1717, continued in existence after World War I, and in 1930, the very year in which section 1305's advocacy provision was enacted, it was still construed, as in *Masses* and *Burleson*, to prohibit mere advocacy. See *Gitlow v. Kiely*, 44 F.2d 227 (S.D.N.Y. 1930).

Furthermore, the governing First Amendment law in 1930 had been established in *Gitlow v. New York*, 268 U.S. 652, and *Whitney v. California*, 276 U.S. 357, both peacetime cases which held that mere advocacy of lawless action constitutionally could be prohibited because of the "bad tendencies" of such expression. While *Gitlow* and *Whitney* later were "thoroughly discredited," *Brandenburg v. Ohio*, 395 U.S. at 447, they remained good law until at least the 1937 decision in *Herndon v. Lowry*, 301 U.S. 242. See Z. Chafee, *supra*, at 318-25, 343-53, 388-98; *Dennis v. United States*, 341 U.S. 496, 505-507 & n. 5; *Brandenburg v. Ohio*, *supra*, 395 U.S. 447-48.

Accordingly, the Congress which enacted the sweeping prohibitory language of section 1305 did so with the knowledge that the Court had upheld similar restraints upon pure expression against First Amendment challenge. It is inconceivable that the 1930 Congress intended that the language of the statute be restricted in accordance with a First Amendment standard that had not yet been developed, and which did not reach final articulation until the *Brandenburg* decision thirty-nine years later.<sup>4</sup>

<sup>4</sup> By contrast, the Congress of 1941 which enacted the Smith Act "was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action . . . and did not intend to disregard it," for, by then, *Gitlow* and *Whitney* already had been undermined. Thus the Smith Act could be construed to incorporate that distinction. See *Yates v. United States*, 354 U.S. 298, 319; *Dennis v. United States*, *supra*, 341 U.S. at 502.

The district court, in thus creating a statute very different from the one Congress intended, necessarily made policy determinations which properly belong in the legislative sphere. Were determination of the issue left to Congress, it might well reach an entirely different resolution than that embodied in the district court's construction of section 1305(a). For example, today's Congress might well conclude that the chances that dissemination of written advocacy ever would produce *Brandenburg's* constitutionally required likelihood of imminent lawlessness are *de minimus*, cf. *Cox v. Louisiana*, 379 U.S. 559, 566, and not worth either the financial costs necessary to enforce a proper restriction or the risks to protected expression inherent in any scheme of administrative prior restraint, even one meeting *Brandenburg's* standards. Judicial reconstruction of section 1305(a)'s advocacy proscription to meet *Brandenburg's* standards displaces the congressional role, while a holding that the statute is invalid on its face would put the task squarely before Congress, where it belongs.

Since "[t]he task of writing legislation which will stay within [the First Amendment's] bounds has been committed to Congress," *United States v. Robel*, 389 U.S. 258, 267, it should be permitted "to decide whether and in what form the statute should be rewritten." See Comment, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel*, 57 Calif. L. Rev. 240, 256 (1969). Section 1305(a)'s advocacy provision must be ruled unconstitutional on its face, as was the state statute in *Brandenburg*. See, e.g., *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441.

Finally, the government suggests that the district court's limiting construction might not be necessary to save section 1305 from constitutional attack (Gov. Motion at 10,

n.11). Purporting to rely on *Kleindienst v. Mandel*, 408 U.S. 753, the government asserts that "it may be that Congress can require written materials to be turned away at the border, even if possession of those materials within the United States could not constitutionally be made a crime" (*Id.*). The government then reserves the right to raise the point should probable jurisdiction be noted.

It is inconceivable that the government in fact would argue such a proposition to this Court. *Kleindienst v. Mandel*, *supra*, the very case on which it purports to rely, explicitly reaffirmed the principle that the government may not prevent its citizens from receiving written materials advocating political, social or revolutionary doctrine or ideas, even from abroad. 408 U.S. at 762-65; accord, *Lamont v. Postmaster General*, 381 U.S. 301. Indeed in *Kleindienst* the government acknowledged the right of United States residents to receive Mandel's ideas through books, pamphlets, tapes and even telephone hook-ups, in arguing that therefore there was no compelling necessity that Mandel be permitted physical entry into the country. 408 U.S. at 765. Thus section 1305 cannot be upheld without the limiting construction to which it is not susceptible. It therefore is unconstitutional.

4. The government asserts that this case does not properly present the issue of whether section 1305(a) is invalid as a prior restraint because the Church's papers were detained for a "short" period<sup>5</sup> without seizure or forfeiture (Gov. Motion at 11).<sup>6</sup> But the Church properly raises its

<sup>5</sup> The government misleads the Court when it states that appellants' correspondence was only delayed "a day or two" (Gov. Motion at 11, n. 12). In fact, the record shows the government did not commence returning the seized correspondence until at least six days had elapsed (J.S. at 6-9).

<sup>6</sup> The government addresses only one of the prior restraint contentions appellants make: That section 1305(a) is facially invalid

facial challenge to section 1305(a)'s prior restraint of advocacy in this case for two reasons. First, the Church's papers were read solely for the purpose of determining whether they should be seized and forfeited under section 1305(a)'s proscription of advocacy; if that statutory predicate for the search is facially invalid, the search itself lacks legal justification. (See J.S. 20-21 n. 20, 26 n. 24 & cases there cited.) Second, the Church, alleging without contradiction that it regularly imports papers from abroad, sought prospective relief against enforcement of the statute to preclude the concrete and objective threat that customs agents would read, detain and seize its papers without a prior warrant and without a prior adversary judicial hearing. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 459; *Dombrowski v. Pfister*, 380 U.S. 479.

The government also contends (Gov. Motion at 11) that in a case properly presenting the issue, the Court might impose the time limits for forfeiture proceedings read into section 1305(a) with respect to alleged obscenity by *United States v. Thirty-Seven Photographs*, 402 U.S. 363. The government ignores the fact that where restraint of ex-

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because it authorizes substantial restraint through detention and seizure of written advocacy of lawlessness without an advance adversary judicial determination of whether it is constitutionally protected or not. See, e.g., *Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10; *Organization for a Better Austin v. Keefe*, 402 U.S. 415. It fails to respond to two other strands of the prior restraint argument: (1) That § 1305(a) is invalid on its face because it authorizes substantial restraint through detention and seizure of written advocacy without an advance judicial warrant. See, e.g., *Zurcher v. Stanford Daily*, 437 U.S. 547, 564; *Roaden v. Kentucky*, 413 U.S. 494, 503-06; and (2) That the statute is facially void because it sanctions a restraint of written advocacy of lawlessness in advance of its dissemination, when determination of its danger, i.e. its inciting effect, rests on mere conjecture and speculation, an insufficient basis for a prior restraint. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 563, 565, 568-69; *New York Times Co. v. United States*, 403 U.S. 713.

pression is sought on grounds that it allegedly advocates lawlessness, time is much more critical than in the case of obscenity and the First Amendment thus requires an adversary judicial inquiry in *advance* of any substantial detention of more than a day. See *Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10. Because it contemplates only mechanisms for post-seizure judicial review, section 1305(a)'s proscription of advocacy may not be judicially rewritten to require such an advance inquiry but must be ruled invalid on its face. See *Blount v. Rizzi*, 400 U.S. 410, as explained in *United States v. Thirty-Seven Photographs*, *supra*, 402 U.S. at 369-70.<sup>7</sup>

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<sup>7</sup> Contrary to the government's claim, such a resolution need not await a case in which customs officers actually refuse importation of advocacy or unduly delay their determination of its importability, nor does the Church have to show that a short delay threatens its speech interests. Judicial appraisal of the relevant competing considerations is made on the face of the statute, as *Blount* and *Thirty Seven Photographs* show. The Church need show nothing more than that the restraint is sought on grounds that its papers contain advocacy of lawlessness to invoke *Carroll's* advance hearing requirement, and that was undisputed below. In any event, the Church made uncontradicted and sworn allegations below that even the shortest of restraints interfered with its expressive interests, disrupting the free flow of communications between its branches and hence interfering with effective Church operations.

**CONCLUSION**

For the reasons stated, the Court should note probable jurisdiction.

Respectfully submitted,

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